IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

ROBERT BRICE CARSON III §

v. § CIVIL ACTION NO. 6:08cv442

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Plaintiff Robert Brice Carson III, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Carson complains that he is being held unlawfully because his mandatory supervision release date was improperly changed. He asks for immediate release as well as monetary compensation.

After review of the pleadings, the Magistrate Judge issued a Report recommending that the lawsuit be dismissed. The Magistrate Judge concluded that Carson's lawsuit concerned the fact or length of his confinement, and therefore was not a fit subject for a Section 1983 lawsuit. To the extent that Carson sought release, the Magistrate Judge said, his claim sounded in habeas corpus, and to the extent that he sought damages, his claim cannot proceed until his allegedly unjust imprisonment, beyond his release date, has been set aside or declared unlawful, *See* Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994). Finally, the Magistrate Judge said, Carson's lawsuit cannot proceed in any event because the sole named Defendant is the Texas Department of Criminal Justice, Correctional Institutions Division, which is a state agency and therefore immune from suit under the Eleventh Amendment. Alabama v

<u>Pugh</u>. 438 U.S. 781 (1978) (*per curiam*). The Magistrate Judge therefore recommended that Carson's lawsuit be dismissed with prejudice as frivolous, although specifying that this dismissal should be without prejudice to Carson's right to challenge the legality of his continued confinement through habeas corpus or any other lawful means, and without prejudice to Carson's right to pursue his claims against the proper Defendant or Defendants in the event that his allegedly unlawful imprisonment is set aside or declared unlawful.

Carson received a copy of the Report on December 5, 2008, but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has carefully reviewed the pleadings and documents in this case, including the Plaintiff's complaint and the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled civil action is hereby DISMISSED with prejudice as frivolous. The dismissal of this lawsuit shall have no effect upon Carson's right to challenge the legality of his confinement through any lawful means, including but not limited to seeking habeas corpus relief in state or federal court, nor shall the dismissal of this lawsuit have any effect upon Carson's right to seek damages against defendants amenable to suit in the event that any portion of his incarceration is determined to be unlawful by a court of competent jurisdiction or is otherwise set aside. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby

So ORDERED and SIGNED this 20th day of January, 2009.

DENIED.

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LEONARD DAVIS UNITED STATES DISTRICT JUDGE